distribution of the plaintiff company's assets as prescribed by the law relating to liquidations.

I am in entire agreement with the analysis of Ogilvie Thompson JA and I think it is undoubtedly correct.

I now come to the second limb of cl 20(e) of the main contract. That limb goes further than the first, and what I have said, as fortiori, applies. It is expressed to arise on the commencement of the liquidation of the plaintiff and if it is invoked on that ground, it is, in my opinion, in contravention of the combined operation of ss 280(1) and 327(2) of the Companies Act. In *Re Jeavons, ex p Mackay*,[6] at p 647, James LJ said:

> ... in my opinion a man is not allowed, by stipulation with a creditor, to provide for a different distribution of his effects in the event of bankruptcy from that which the law provides. It appears to me that this is a clear attempt to evade the operation of the bankruptcy laws.

Similarly Mellish LJ said, at p 648:

> That is to say, as I understand it, a person cannot make it a part of his contract that, in the event of bankruptcy, he is then to get some additional advantage which prevents the property being distributed under the bankruptcy laws.

Further, in *Re Johns; Worrell* v *Johns*[7] where a mortgage provided for a greater benefit to enure to the mortgagee in the event of the bankruptcy of the mortgagor occurring, which did occur, Tomlin J, in declaring such a provision as bad, said, at pp 747:

> ... and that it falls exactly within the words in *Ex p Williams* (1877) 7 Ch D 138 that I have read: 'A person cannot make it a part of his contract that, in the event of bankruptcy, he is then to get some additional advantage which prevents the property being distributed under the bankruptcy laws'. I read that as meaning not only the bankruptcy cannot do that, but having regard to the position in that case of *Ex p Williams* (1877) 7 Ch D 138, the mortgagee cannot do it. He cannot make a bargain with the mortgagor which secures to him, the mortgagee, a greater advantage if the mortgagor becomes bankrupt than he would get if he does not.

In this case, the second limb of cl 20(e) does not provide the government with any additional benefit, if it is invoked by it; but it does provide for a different distribution of the property of the plaintiff which is now in liquidation from that which the law provides. On the principle of *Ex p Mackay*[6] and *Re Johns*,[7] that provision of cl 20(e) cannot bind the liquidation of the plaintiff.

Lastly, counsel for the fifth defendant submitted that moneys due to the nominated sub-contractors do not belong to the plaintiff in any event but held on trust for them. I do not see how such a trust can arise. There is clearly lacking the subject matter of the trust; there is not in the hands of the government any fund in respect of which a trust can be implied in law for the benefit of the nominated sub-contractors. The government is not holdings, nor has it earmarked, any fund for the specific purpose of making payment to the sub-contractors. It may be, and probably it is, under an obligation to make payments under the main contract; but such obligatory payments are to be made to the plaintiff. The government is under no obligation to make any payment to the sub-contractors under cl 20(e); it may elect to do so, if it wishes. If it does not elect to do so, the sub-contractors have no claim against it whatsoever. The cases of *Barclays Bank Ltd* v *Quistclose Investments Ltd*[8] and *Toovey* v *Milne*[9] are wholly irrelevant and are of no assistance here.

In the result, in my judgment, if cl 20(e) of the main contract is invoked, it would in the circumstances contravene the combined operation of ss 280(1) and 327(2) of the Companies Act; the liquidator is not bound by that clause, and consequently any payment made thereunder to the sub-contractors is void as against him.

I was told that the parties have agreed between themselves on the question of costs, and accordingly I make no order thereon.

Order accordingly.

Solicitors: *Joseph Tan Jude Benny & Co*; *Tan Lee & Choo*.

Reported by *Kevin Mathews*

Kian Choon Investments (Pte) Ltd v Societe Generale & Anor

HIGH COURT (SINGAPORE) — SUIT NO 1618 OF 1989
THEAN J
15 JANUARY 1990

Land Law — Mortgage — Mortgagee's duty in sale of secured land — Sale by mortgagee with option to repurchase

Banking — Mortgage — Duty of mortgagee in selling mortgaged property

Civil Procedure — Interim injunction — Mortgagee's sale of land — Whether damages adequate remedy

The plaintiffs are the owners of the land and premises with a building thereon known as 'The Octagon' ('the property'). They executed two mortgages respectively in favour of the first defendants ('the bank') to secure banking facilities. The plaintiffs were in default under the mortgages, and the bank appointed receivers to receive the rents and profits of the property. Eventually, the parties came to an amicable settlement, embodied in a deed of compromise. In so far as the property is concerned, the deed of compromise provided, inter alia, that possession thereof was to be delivered to the bank subject to existing tenancies and conferred on the bank certain rights. Accordingly, the bank took possession of the property as mortgagee. The bank initiated steps to sell the property as mortgagee and later agreed to sell the property to Amcol, the second defendant. Two terms of this agreement are material. Amcol granted to the bank a lease of four

floors of the property and also agreed to grant to the bank an option to repurchase six floors of the property. Pursuant to that clause and contemporaneously with the execution of the sale agreement, the option was granted by Amcol to the bank.

The sale subsequently came to the notice of the plaintiffs. They challenged the sale by way of an application for an interlocutory injunction restraining both the defendants from completing the sale and purchase of the property in pursuance of the sale agreement. The plaintiffs complained that the bank as mortgagee, in exercising their power of sale, have not discharged their duties; they have not acted in good faith in relation to the sale and have not taken reasonable steps to obtain the best price in the circumstances. First, no steps were taken by the bank to give reasonable publicity of their intention to sell the property. Secondly, a property called Cecil Court, which is opposite the property, had been put up for sale and tenders had been invited. The bank were also the mortgagee of that property. The bank did not wait to see the result of the tenders before entering into the sale agreement. The tenders submitted and the price at which Cecil Court was sold would provide useful indicators as to the probable price at which the property would fetch in the open market. Finally, in selling the property to Amcol, the bank negotiated and obtained benefits for themselves other than the purchase price for payment of the debt owed by the plaintiffs. The bank as mortgagee could and should have explored the possibility of disposing of individual floors separately which would or might then fetch a higher price.

Held, allowing the plaintiffs' application:

(1) A mortgagee in exercising the power of sale has two duties: the duty to act in good faith and the duty to take reasonable steps to obtain the best price available in the circumstances or, the true market value thereof at the time of sale.

(2) In a case such as this, there is a conflict between the mortgagee's interest to repurchase the part of the property at the lowest price and his duty to sell the entire property at the best price available. The mortgagee would have to show that the sale was made in good faith and that reasonable precautions had been taken to obtain the best price reasonably obtainable in the circumstances.

(3) The court's view of the construction of art 3.1(a) and (b) of the deed of compromise at this stage of the proceedings, is a prima facie one. The court does not think that these provisions constitute the bank an absolute owner of the property or deprive the plaintiffs of any interest in the property. These provisions may have the effect of enlarging the rights of the bank as mortgagee and the bank, notwithstanding the execution of the deed of compromise, continues to be a mortgagee of the property. Nor does the court think that these provisions enable the bank to dispose of the property without any regard to the rights of the plaintiffs as mortgagor.

(4) The clause must be construed in the state of things as they were at the time of execution of the deed of compromise. It cannot apply to circumstances of which the parties had no knowledge at the time or which had not occurred. It could not have been intended that the plaintiffs agreed at the time of execution of the deed to waive any rights and remedies against the bank for any breach of duty as mortgagee which would or might be committed at a subsequent date.

(5) It is arguable that Amcol were seized of facts sufficient to place them on notice that the sale of the property by the bank was in breach of the bank's duties as mortgagee. Even if Amcol had no knowledge of any impropriety of the bank in relation to the sale, an injunction could still properly be granted against them.

(6) The plaintiffs have certainly established that there are serious questions to be tried. Prima facie, what the bank did went beyond mere failure to take reasonable steps to obtain the best price for the property in the circumstances. Their conduct at the time of the sale reflected a calculated indifference to the position of the mortgagor and could be said to be 'reckless' and to 'sacrifice' the mortgagor's interest.

(7) The court was not satisfied that in this case damages would be an adequate remedy to the plaintiffs, should they succeed at the trial. Damages would not be an adequate remedy to a party who is being or will be deprived of his enjoyment of land. The principle governing the grant or refusal of interlocutory injunction as laid down in *American Cyanamid* is not an inflexible rule. By its very terms, it admits of exceptions.

(8) On the material before the court, there is a cogent prima facie case. If the plaintiffs make good their case at the trial, they would be entitled to a perpetual injunction against both the defendants: it is not an answer to an application for an interlocutory injunction to say that damages would be an adequate remedy.

(9) If the requirement that the plaintiffs bring to court the whole of the amount due and owing to the bank is imposed in this case, it is impossible to fulfil and would cause manifest hardship; in a case in which the power of sale is exercisable and the only dispute is as to the amount due or the mode in which the mortgagee proposes to exercise the power of sale, the ordinary rule would apply and the whole amount alleged to be due and owing to the mortgagee would be required to be paid into court. But the present case does not fall squarely within this class.

(10) Both the defendants should be protected against any loss or damage which they or either of them may suffer as a result of the interlocutory injunction, should it turn out that the plaintiffs fail at the trial to make good their claim for a perpetual injunction. The court took the figure of $8m which the court considered as fair and reasonable in the circumstances; it represents slightly more than 6% of the sum of $131m. The court therefore imposed the term requiring the plaintiffs to deposit in court a sum of $8m or furnish a banker's guarantee for that amount to secure the cross-undertaking as to damages.

[*Editorial Note*: The first defendants have appealed to the Court of Appeal vide Civil Appeal No 92 of 1989. The second defendants have appealed vide Civil Appeal No 91 of 1989.]

Cases referred to

1 *Cuckmere Brick Co Ltd & Anor* v *Mutual Finance Ltd* [1971] 1 Ch 949 (folld)
2 *Tse Kwong Lam* v *Wong Chit Sen & Ors* [1983] 3 All ER 54 (folld)
3 *Forsyth & Anor* v *Blundell & Anor* (1972-1973) 129 CLR 477 (folld)
4 *Blundell & Anor* v *Associated Securities Ltd & Ors* [1971] 19 FLR 17 (folld)
5 *Bishop* v *Bonham* [1988] 1 WLR 742 (refd)
6 *Low Fong Mei & Anor* v *Ko Teck Siang & Ors* [1989] 3 MLJ 140 (folld)
7 *American Cyanamid Co* v *Ethicon Ltd* [1975] AC 396 (refd)
8 *Good Property Land Development Pte Ltd* v *Societe Generale* [1989] 2 MLJ 14 (folld)
9 *Parry* v *Grace* [1981] 2 NZLR 273 (refd)
10 *Harvey* v *McWatters* [1948] 49 SR (NSW) 173 (refd)
11 *Macleod* v *Jones* (1883) 24 Ch D 289 (folld)

Lawrence Wee for the plaintiffs.
Alan Thambiayah for the first defendants.
Michael Hwang (*Choi Yok Hung* (*Miss*) with him) for the second defendants.

Cur Adv Vult

Thean J: The plaintiffs are the owners of the land and premises marked on the Government Resurvey Map as lot 175 of town sub-division II with a building thereon known as 'The Octagon' ('the property'). They executed two mortgages dated 24 June 1980 and 28 November 1981 respectively in favour of the first defendants ('the bank') to secure banking facilities. Some years after these two mortgages, that is, in 1988 or thereabouts, the plaintiffs were in default under the mortgages, and on 1 March 1988, the bank appointed receivers to receive the rents and profits of the property. At about that time, several proceedings were instituted by the bank against the plaintiffs, and vice versa. Eventually, the parties came to an amicable settlement, and the terms of the settlement were embodied in a deed of compromise dated 30 November 1988, which was executed by the plaintiffs, the bank and other necessary parties.

In so far as the property is concerned, the deed of compromise provided, inter alia, that possession thereof was to be delivered to the bank subject to existing tenancies and conferred on the bank certain rights, which I shall set out in greater detail shortly. Accordingly, the bank took possession of the property as mortgagee. It appears that some time prior to the execution of the deed of compromise, the plaintiffs had taken steps to bring the property under the Land Titles Act (Cap 157, 1985 Ed) and applied for strata sub-division for individual floors of the property and for issue of separate subsidiary strata certificates of title to them under the Land Titles (Strata) Act (Cap 158, 1985 Ed). After the execution of the deed of compromise, the bank continued with the prosecution of these applications, the purpose of which was — so the bank maintained — 'to facilitate the disposal of the property in the best interest of both [parties]'. It appears that at or about that date or slightly later — the precise date was not stated — strata sub-division had been approved and the property had been brought under the Land Titles Act (Cap 157, 1985 Ed), but subsidiary strata certificates of title had not been issued.

After the execution of the deed of compromise (so far as the documents before me show), nothing eventful happened in relation to the property until May 1989. On 11 May 1989, the bank wrote to the plaintiffs offering to take a lease of the 20th, 22nd, 24th and 25th floors of the property for a term of ten years at a rent of $2.15¢ per sq ft plus service charge then prevailing which was 85¢ per sq ft. They also requested that the plaintiffs should grant to them a period of three months from 1 June 1989 free of rent and service charge. All rents and service charges payable by the bank would be set off against the indebtedness then owing by the plaintiffs to the bank. In response, the plaintiffs through their solicitors wrote to the bank's solicitors rejecting the offer made by the bank and in turn offering to lease to the bank the four floors for a term of two years from 1 July 1989 at a rent of $3 per sq ft inclusive of service charge. This counter-offer by the plaintiffs was accepted by the bank through their solicitors on or about 16 June 1989.

In the meanwhile, in the month of June 1989 or slightly earlier, the bank initiated steps to sell the property as mortgagee. According to the second defendants ('Amcol'), the bank sometime in June 1989 — the exact date was not stated — approached Amcol and offered to sell the property to the latter at a price of $1.080 per sq ft and on certain terms. Presumably, arising from this offer, discussions and negotiations between the two parties followed. Each party at or about that time engaged their own valuer to provide a valuation of the property. The bank's valuers, Jones Lang Wootton, in their valuation report dated 29 June 1989, valued the property at $131,000,000; Amcol's valuers, Chesterton International, in their valuation report dated 23 June 1989, valued the property at $131,800,000. It seems to me that these valuations were obtained by them respectively for the purpose of the transaction in respect of which they were then having negotiations. After the respective parties had obtained their valuations, there were presumably further negotiations between them as regards the price and other terms of the sale and purchase and, eventually, on 1 July 1989, the parties executed the sale and purchase agreement ('the sale agreement'), whereby the bank as mortgagee agreed to sell to Amcol the property at the price of $131,000,000 subject to the terms and conditions as therein stated. For the purpose of the application before me, there are two terms which are material. First, under cl 3 of the sale agreement, the property is sold subject to Amcol granting to the bank a lease of the four floors of the property, namely, 20th, 22nd, 24th and 25th storeys, for a term of five years at a rent of $3 per sq ft for the first two years and thereafter at a rent of $5 per sq ft. Secondly, under cl 16 of the sale agreement, Amcol agreed to grant to the bank an option to repurchase six floors of the property, namely, the 20th, 21st, 22nd, 23rd, 24th and 25th storeys, at the price of $30,294,213.10 plus interest thereon at the prevailing prime rate of interest of The Development Bank of Singapore Ltd covering the period from the date of completion of the sale under the sale agreement to the date of completion of the repurchase but less the rent paid by the bank to Amcol under the lease. Pursuant to that clause and contemporaneously with the execution of the sale agreement, the option was granted by Amcol to the bank.

The sale subsequently came to the notice of the plaintiffs. They challenged the sale. On 28 August 1989, they instituted this action against both the bank and Amcol.

Later, on 7 September 1989, the plaintiffs applied by Summons-in-Chambers No 5250 of 1989 for an interlocutory injunction restraining both the defendants from completing the sale and purchase of the property in pursuance of the sale agreement and from taking any further steps in relation thereto until the trial of the action or until further order. The application was resisted, and I adjourned it to open court for argument. At the conclusion of the hearing, I granted to the plaintiffs, on the usual cross-undertaking by them as to damages, the injunction applied for, subject to the plaintiffs depositing in court prior to 31 October 1989 a sum of $8m or furnishing a banker's guarantee for the said sum on terms satisfactory to the registrar as security for their cross-undertaking as to damages, in default of which the interlocutory injunction would be discharged or dissolved. I also ordered an early trial of this action.

The plaintiffs complained that the bank as mortgagee in exercising their power of sale have not discharged their duties: they have not acted in good faith in relation to the sale and have not taken reasonable steps to obtain the best price in the circumstances. First, no steps were taken by the bank to give reasonable publicity of their intention to sell the property, such as advertisement in newspapers inviting tenders for the purchase of the property. They merely approached their customers, Amcol, with an offer of the property for sale at a certain price and thereafter negotiated with them; at or about the same time the bank obtained a valuation, and soon thereafter concluded the sale agreement.

Secondly, at or about the same time, that is June 1989, a property called Cecil Court, which is opposite the property, had been put up for sale and tenders had been invited. The bank were also the mortgagee of that property and had engaged a firm of public accountants to take charge of and conduct the sale. The tender closed on 7 July 1989, and the bank did not wait to see the result of the tenders before entering into the sale agreement. Cecil Court was eventually sold for a sum of $98,680,000. The bank should have waited for the sale of Cecil Court to be concluded before initiating steps to dispose of the property. The tenders submitted and price at which Cecil Court was sold would provide useful indicators as to the probable price at which the property would fetch in the open market.

Finally, in selling the property to Amcol, the bank negotiated and obtained benefits for themselves other than the purchase price for payment of the debt owed by the plaintiffs. The benefits consist of: (i) a firm agreement by Amcol to lease to them the four floors of the property for a term of five years, and (ii) an option to repurchase from Amcol the uppermost six floors of the property. These terms, the plaintiffs said, were great advantages to the bank and were restrictions on the sale of the property.

It was also pointed out that the applications for strata sub-division and issue of subsidiary certificates of title to the individual floors of the property were well under way and were nearing completion. The bank as mortgagee could and should have explored the possibility of disposing of individual floors separately which would or might then fetch a higher price.

I now turn to the authorities relied upon by counsel for the plaintiffs in his argument that a mortgagee, in exercising his power of sale of the mortgaged property, owes to his mortgagor a duty to act in good faith and also a duty to take reasonable steps to obtain the best price available in the circumstances. The leading authority on this point is undoubtedly *Cuckmere Brick Co Ltd & Anor* v *Mutual Finance Ltd.*[1] In that case, the plaintiffs charged their land to the defendants by way of legal mortgage to secure a certain sum of money. They later obtained planning permission to erect 35 houses thereon but no development took place. The defendants, in exercise of their statutory power, took possession of the land and instructed auctioneers to sell it. There were advertisements for the sale of the land with planning permission for the erection of the houses; but there was also planning permission for 100 flats which was not mentioned in the advertisement. The plaintiffs drew that fact to the attention of the defendants and asked that the sale be postponed. The defendants refused, but they undertook to instruct the auctioneers to mention at the sale the existence of the permission for the flats. The land was subsequently sold. On a claim by the plaintiffs against the defendants, Plowman J held that the defendants had failed in their duty to the plaintiffs in failing to advertise the planning permission for 100 flats and in refusing to postpone the sale. On appeal, his decision on that point was affirmed. Salmon LJ (as he then was) in his judgment said, at p 966:

> There are some dicta which suggest that unless a mortgagee acts in bad faith he is safe. His only obligation to the mortgagor is not to cheat him. There are other dicta which suggest that in addition to the duty of acting in good faith, the mortgagee is under a duty to take reasonable care to obtain whatever is the true market value of the mortgaged property in the moment he chooses to sell it: compare, for example, *Kennedy* v *de Trafford* [1896] 1 Ch 762; [1897] AC 180 with *Tomlin* v *Luce* (1889) 43 Ch D 191, 194.
>
> The proposition that the mortgagee owes both duties, in my judgment, represents the true view of the law. Approaching the matter first of all on principle, it is to be observed that if the sale yields a surplus over the amount owed under the mortgage, the mortgagee holds this surplus in trust for the mortgagor. If the sale shows a deficiency, the mortgagor has to make it good out of his own pocket. The mortgagor is vitally affected by the result of the sale but its preparation and conduct is left entirely in the hands of the mortgagee. The proximity between them could scarcely be closer. Surely they are 'neighbours'. Given that the power of sale is for the benefit of the mortgagee and that he is entitled to choose the moment to sell which suits him, it would be strange indeed if he were under no legal obligation to take reasonable

care to obtain what I call the true market value at the date of the sale.

Clearly on this authority, a mortgagee in exercising the power of sale has two duties: the duty to act in good faith and the duty to take reasonable steps to obtain the best price available in the circumstances or, in the words of Salmon LJ, the true market value thereof at the time of sale.

The decision in *Cuckmere*[1] was approved by the Privy Council in the case of *Tse Kwong Lam* v *Wong Chit Sen & Ors*[2] which was an appeal from the Hong Kong Court of Appeal. In that case, the mortgagee of a property upon default by the mortgagor proceeded to exercise the power of sale and arranged for the sale to be effected by a public auction. Auctioneers were appointed and the date of the sale was fixed; advertisements were placed in three newspapers on three separate days giving the date of the auction and a minimum description of the property. The mortgagee, without consulting the auctioneers or other estate agents about the sale, fixed the reserved price. At the auction, there was only one bid and that was put up by the company which was financed by the mortgagee and in which the mortgagee, his wife and son were directors. The property was sold to the company and subsequently the mortgagor sought to set aside the sale on the ground that the sale to the company had been improper and at an undervalue. The court of first instance found that the price paid by the company was not a proper price but refused to set aside the sale because of the lapse of time and instead awarded damages to the mortgagor. On appeal by the mortgagee, the Court of Appeal set aside the judgment and against that decision the mortgagor appealed to the Privy Council. The Privy Council held that the mortgagee, in exercising the power of sale, could sell the property to a company in which he had an interest, but in such case the mortgagee and the company had to show that the sale was made in good faith and that the mortgagee had taken reasonable precautions to obtain the best price reasonably obtainable at that time, and that on the facts of that case, the sale to the company could not be supported as the mortgagee had failed to establish that all reasonable steps had been taken to obtain the best price reasonably obtainable. Lord Templeman, in delivering the judgment of the Board, said at p 59:

> In the view of this Board, on authority and on principle, there is no hard and fast rule that a mortgagee may not sell to a company in which he is interested. The mortgagee and the company seeking to uphold the transaction must show that the sale was in good faith and that the mortgagee took reasonable precautions to obtain the best price reasonably obtainable at the time. The mortgagee is not however bound to postpone the sale in the hope of obtaining a better price or to adopt a piecemeal method of sale which could only be carried out over a substantial period or at some risk of loss.
>
> In the present case in which the mortgagee held a large beneficial interest in the shares of the purchasing company, was a director of the company and was entirely responsible for financing the company, the other shareholders being his wife and children, the sale must be closely examined and a heavy onus lies on the mortgagee to show that in all respects he acted fairly to the borrower and used his best endeavours to obtain the best price reasonably obtainable for the mortgaged property.

And he continued, at p 60:

> In the result their Lordships consider that in the present case the company was not debarred from purchasing the mortgaged property but, in view of the close relationship between the company and the mortgagee and in view in particular of the conflict of duty and interest to which the mortgagee was subject, the sale to the company for $1.2m can only be supported if the mortgagee proves that he took reasonable precautions to obtain the best price reasonably obtainable at the time of sale.

He then examined the circumstances in which the mortgagee put up the property for auction and held that the mortgagee had not taken reasonable steps to secure the best price that could reasonably be obtained. In particular, he observed that the mortgagee did not appear to have taken any steps to secure any interest in the auction; he did not consult the estate agents or auctioneers about the method of sale, about the possibility of stimulating interest in the auction and about the reserve price; nor did he instruct them to try to interest the investing public in the property. He said at p 63:

> A mortgagee who wishes to secure the mortgaged property for a company in which he is interested ought to show that he protected the interests of the borrower by taking expert advice as to the method of sale, as to the steps which ought reasonably be taken to make the sale a success and as to the amount of the reserve. There was no difficulty in obtaining such advice orally and in writing and no good reason why a mortgagee, concerned to act fairly towards his borrower, should fail or neglect to obtain or act on such advice in all respects as if the mortgagee were desirous of realizing the best price reasonably obtainable at the date of the sale for property belonging to the mortgagee himself.
>
> Where a mortgagee fails to satisfy the court that he took all reasonable steps to obtain the best price reasonably obtainable and that his company bought at the best price, the court will, as a general rule, set aside the sale and restore to the borrower the equity of redemption of which he has been unjustly deprived.

However, because the mortgagor had been guilty of inexcusable delay in prosecuting his claim, he was not entitled to have the sale set aside but only to the alternative remedy of damages.

Plainly, the facts in that case are different from those in the present case. However, looking purely at the sale agreement and the option given pursuant thereto, I can see no material difference in principle between a case, such as *Tse Kwong Lam*,[2] where the mortgagee sells the mortgaged property to a company controlled and substantially owned by him and a case, such as the present, where the mortgagee sells the property to an independent third

party but on terms that entitle him to make an immediate repurchase of a substantial part of the property at virtually the same price at which he sells the property. In a case such as this, as in *Tse Kwong Lam*,[2] there is a conflict between his interest to repurchase the part of the property at the lowest price and his duty to sell the entire property at the best price available. Again, as in *Tse Kwong Lam*,[2] he would have to show that the sale was made in good faith and that he has taken reasonable precautions to obtain the best price reasonably obtainable in the circumstances.

An authority which is of particular relevance here and which I find very helpful and instructive is the decision of the High Court of Australia in *Forsyth & Anor* v *Blundell & Anor*.[3] In that case, the plaintiff, RG Blundell, in 1968 borrowed a sum of $125,000 from Associated Securities Limited ('ASL'), secured by, inter alia, a mortgage over his property. That property had a special value to a limited class of potential purchasers, the oil companies. Subsequently, Blundell was in default and the power of sale became exercisable by ASL. In February 1969, ASL obtained possession of the mortgaged property, and it was then put in the hands of agents for sale. Up to February 1970, there was only one firm offer of purchase at the price of $90,000. The price at which the property had been listed by the agents was $150,000. This appeared to be based on a valuation at $151,200 which had been given in 1967 by a valuer; the same valuer in August 1970 valued the property at that date at $152,900, and as at 15 March 1970, at $151,700. Several other valuations were given and placed the value of the property at a sum of less than $100,000. A public auction for the sale of the property was arranged and the date of the auction was fixed. Before the date of the auction, XL Petroleum Pty Ltd ('XL') expressed interest in paying out the mortgagee which was then owed approximately $120,000 or in bidding for a sum up to $150,000 at the auction. Subsequently, discussions took place between the representative of ASL and the representative of Shell Oil Company of Australia Ltd ('Shell'). Arising from the discussions, Shell made an offer to ASL to purchase the property for $120,000 conditional upon exchange of contracts within seven days, and in making that offer Shell intimated that if the offer was not accepted, Shell might not attend or bid at the auction. ASL accepted the offer of Shell. The representative of ASL in his negotiation for the sale of the property to Shell, did not inform the latter of the interest expressed by XL; nor did anyone from ASL inform XL of Shell's offer. Blundell thereupon commenced proceedings against ASL and Shell for a declaration that the sale of the mortgaged property was not a bona fide exercise of the mortgagee's power of sale and for an injunction restraining the completion of the sale. The action was heard by Fox J of the Supreme Court of the Australian Capital Territory, and at the conclusion of the hearing he made a declaration that Blundell was entitled to redeem the mortgages and granted an injunction restraining ASL from completing the sale: *Blundell & Anor* v *Associated Securities Ltd & Ors*.[4] On the issue of the exercise of the power of sale by ASL, Fox J expressed his finding in the following terms at p 38:

> Certainly, ASL failed to take reasonable steps to obtain the best price available in all the circumstances. But the matter really goes beyond that. It seems to me that the conduct of ASL at and about the time of sale reflected calculated indifference to the position of the mortgagor. It could well be said, using the language of the cases, that ASL was 'reckless' and that it 'sacrificed' the interests of the mortgagor.

It is significant that the injunction was granted notwithstanding that Shell did not have any knowledge of the impropriety on the part of ASL or in any way collude with ASL to deprive Blundell of his interest in the property. On appeal, the High Court of Australia, by a majority, affirmed the decision of Fox J and, in so far as the injunction was concerned, went further and varied the order of Fox J by adding an order restraining Shell from completing the contract of sale. Walsh J, who delivered the leading judgment of the court, reviewed the evidence at great length. In particular, with regard to the offer by Shell and their intimation that they might not attend the auction, Walsh J observed, at p 492:

> But even if it be considered that ASL as mortgagee was entitled to suppose that Shell might not take part in the auction and that it was possible that there would be no bid of $120,000 or more, it is clear, in my opinion, that in the circumstances that existed those considerations did not justify the proposal by ASL of a sale at that price to Shell and its subsequent acceptance of Shell's offer, without any attempt to find out whether or not XL would pay more or alternatively would provide the money to pay off the mortgage debt.
>
> Having been told that if necessary XL would pay the debt ASL was not justified, in my opinion, in using its power of sale to obtain payment, without exploring an alternative method of obtaining payment which would protect fully its own interests and which was likely to produce a much better result for the mortgagor.

Mason J expressed his views on the offer of Shell and the chances of losing it in the following terms, at p 510:

> I cannot agree that in the circumstances there was a grave risk of losing all in the event that the Shell offer was not accepted according to its terms. If Shell was prepared to offer $120,000 privately to retain a site which had previously been tied to it as an outlet for its petroleum products, there was every reason for thinking that it would repeat that offer at auction, notwithstanding the suggestion that it might not do so. But in any event there was no risk whatsoever in ASL informing XL that it had received a firm offer of $120,000 and inquiring whether it was prepared to do better. Its failure to inform XL and Blundell, its determination to sell privately to Shell for $120,000 and not proceed to auction all indicate that its sole interest was to obtain payment of its debt, interest and expenses.

On the nature of the breach of duty as mortgagee on the part of ASL, Walsh J said, at pp 493-494:

The breach of duty which has been found to have been committed by ASL did not consist merely of a careless failure to carry out the sale in a manner which reasonable care required. Although his Honour thought that a partial explanation of what occurred was to be found in the lack of sufficient communication between Wilkie and Owen, it appears that in proceeding with the sale to Shell without referring to Blundell or Sykes, ASL acted in a way which would produce enough money to satisfy its own interests, and it was *those interests alone that were really considered. While ASL as mortgagee was entitled to have regard primarily to its own interests, it was not entitled, if those interests were not at risk, to act in a manner which sacrificed the interests of the mortgagor. What the mortgagee did in this case was done deliberately and not through carelessness.* (Emphasis added.)

On the question of granting injunction restraining the sale, he said, at p 496:

This is not a case in which the only relevant finding against ASL was a finding of negligence. In effect, there was also a finding that in making the contract there was a reckless disregard of the interests of the mortgagor. I am of the opinion that in such circumstances the completion of the contract may be restrained.

And he then went on and elaborated in greater detail at pp 497-498:

In my opinion, if the mortgagee does not exercise the power of sale 'in good faith' (in the sense explained above) and the purchaser has knowledge of the facts which show the lack of good faith, the purchaser cannot obtain a right superior to the right of the mortgagor. ... But if the person who agrees to purchase has no notice of any impropriety at the date of contract and continues to have no notice at the time when it is completed, he will obtain a title which cannot be challenged by the mortgagor. ...

If the purchaser is without notice of the relevant facts at the date of the contract, but the mortgagor takes action to challenge its propriety before completion and proves that on the part of the mortgagee it was improper, the question is whether the purchaser has a right which prevails over the right which the mortgagor would have, as between himself and the mortgagee, to restrain the completion of the contract. That is the question in this case.

The mortgagor's interest was, of course, prior in time to any interest acquired by the purchaser. The right of the mortgagor was not merely an equity of redemption. The mortgages did not operate as transfers of his title to the land: see the Ordinance, s 93(1). His title could be divested by a transfer in pursuance of a contract of sale made by the mortgagee in the exercise of the power of sale. But until that occurred, he retained a legal interest in the land.

Even if the contest between these parties should be resolved on the basis that there is a competition between equitable interests, in my opinion, the position of the purchaser, so far as the applicable general principles are concerned, would not be any better.

I now turn to the facts before me as disclosed by the affidavits. What the bank did in relation to the sale of the property to Amcol appeared to be this. In May or early June 1989, they arrived at a certain price for the property; they then approached Amcol with an offer to sell it at that price and on certain terms. Mr Kang Hwi Wah, the managing director of Amcol, in his affidavit affirmed on 11 September 1989 said:

4 Sometime in June 1989, the first defendants approached Amcol and offered to sell the Octagon Building to Amcol at $1.080 per sq ft.

5 The offer made by the first defendants was on terms that there was to be a lease back to the first defendants of four (4) storeys of the Octagon Building which they were then occupying at the same rates as they were enjoying from the plaintiffs. In addition the first defendants were also to be given an option to purchase six (6) storeys of the Octagon Building.

6 The directors of Amcol had observed that the property market had moved up in the first half of 1989 and took the view that it would be a good time to purchase a building like the Octagon Building.

Negotiations between the bank and Amcol then commenced. At or about that time the bank instructed Jones Lang Wootton to carry out a valuation of the property; the valuers completed their valuation and delivered their report on or about 29 June 1989. Armed with the report, the bank finalized their negotiations with Amcol and concluded an agreement with the latter on 1 July 1989 which, inter alia, provided for the sale of the property to Amcol at $131,000,000 and further provided for a lease to the bank of the four floors of the property for a term of five years at certain rents and an option to the bank to repurchase the uppermost six floors of the property at a certain price.

The immediate question that arises is what precautions the bank took in relation to the sale. On the material before me, there was no evidence that the bank took any of these steps: to test the market, advertise their intention to sell the property, invite tenders or bids for the property and instruct estate agents to interest the investing public or stimulate enthusiasm or interest of potential buyers for the property. The bank was fully aware that strata subdivision of individual floors of the property had been obtained and that strata certificates of title thereto would be issued in due course. This clearly is an important fact which could and should be exploited in a sale of the property. The bank, however, had not consulted, and certainly there was no evidence or suggestion before me, that they had consulted, any real estate agents as to the prospect of selling the property by individual floors with a view to fetching a higher price. There is a further material fact. By June 1988, the bank had already set in motion the sale of Cecil Court, a building which is just opposite the property, and had appointed a firm of public accountants to take charge of and conduct the sale. Tenders had been invited; the advertisements appeared in various newspapers between 29 May and 21 June 1989, and the closing date was 7 July 1989. The property is far superior to Cecil Court; its tenure is freehold whereas that

of Cecil Court is leasehold comprising a term of 99 years from 25 July 1981; it has a much larger strata floor area than Cecil Court, and, as I have mentioned, it has strata sub-division and would soon have subsidiary strata certificates of title to the individual floors. Surely in these circumstances, and particularly in a rising market, a reasonable and prudent precaution to take would be to await the outcome of the tenders before initiating any steps to sell the property.

Mr Charles Pierron, the deputy general manager of the bank, in his affidavit affirmed on 11 September 1989, did not say much with regard the precautions the bank took in relation to the sale of the property. He relied principally on the valuations that had been obtained in respect of Cecil Court and the property. In para 22 he said, amongst other things, that by reason of the publicity generated by the various proceedings between the various parties including the appointment of receivers of the property and the winding-up proceedings against the plaintiffs and the order for possession obtained, the bank received 'various proposals from parties who intimated their interests in purchasing [the property]'. No documentary evidence, however, of the 'various proposals' has been produced. It is not clear when the 'various proposals' were made to the bank, but in the context of what Mr Pierron said, these proposals were made probably at or about the time when the disputes took place between the parties or the time of the amicable settlement. If this is correct, then these proposals were out of date and could not possibly afford any guidance or assistance, as the property market, in the words of Mr Kang, had moved up in the first half of 1989. On the other hand, if these proposals came to the bank just before June 1989, then the relevant question is whether they were sufficiently concrete and meaningful to merit any serious consideration. If none of them were of such a nature, then cadit quaestio. If, however, the proposals or some of them were of such a nature, then a reasonable step to take would be for the bank to put or cause to be put these proposals into a competition, eg by notifying the proposers of the rival bids made by others (without disclosing the names) and inviting them to improve their own bids or by advertising the property for sale and inviting bids or tenders to be submitted. Nothing of the kind appeared to have taken place.

Mr Charles Pierron in para 22 of his affidavit affirmed on 11 September 1989 further said, amongst other things, that the bank's general manager apprised Miss Valerie Koh, a representative of the plaintiffs, of certain proposals for or in respect of the property at a meeting on 16 May 1989 and 'as a gesture of goodwill' enquired whether the 'Jauw family' would be interested in 'buying back' the property and that no response was received from the plaintiffs. This statement was disputed by the plaintiffs. At any rate, assuming that that was true, it seems to me somewhat odd and puzzling that it was not part of this 'gesture of goodwill' to inform Miss Koh also that the bank would be taking steps to sell the property soon at a certain price they had in mind. I find this omission even more surprising when viewed in the state of things as they were at the material time. At or about the time when the bank were negotiating with Amcol, they were also negotiating with the plaintiffs for a lease of the four floors of the property. However, not a word of their intention to sell the property at a certain price was communicated to the plaintiffs. Without divulging the name of Amcol, they could have intimated to the plaintiffs that negotiations were on foot or would soon be initiated for the sale of the property at a certain price and could have enquired whether the plaintiffs could procure a potential bidder for the property who would better the price they then contemplated. After all, the plaintiffs and the bank were at all material times prior to the sale of the property 'in friendly communication with each other pertaining to the property' — a fact asserted by the plaintiffs and not disputed or denied by the bank.

Lastly, Mr Charles Pierron said in para 22:

> To ascertain whether these proposals were indicative of the market value, the bank obtained the said Jones Lang Wootton open market valuation which stated an open market value of $131m for the property. This valuation did not take and could not have taken into account the lease arrangements made between the first and second defendants and the option to purchase granted by the second defendants.

It seems to me that the valuation of Jones Lang Wootton was taken at the time for the purpose of the intended sale and not 'to ascertain whether these proposals were indicative of the market value' of the property. If the purpose of the valuation is the latter, then it seems to me that the valuation was quite unnecessary, as none of the proposals had given rise to any serious considerations and negotiations which could lead to a fruition. Further, that valuation, if not obtained for the purpose of the sale, would be rather untimely; the bank could have waited for the results of the tenders for Cecil Court before giving instructions for the valuation, as the sale price for Cecil Court would provide a relevant and useful indicator of current market price of the property at the time.

The bank relied on the deed of compromise and their counsel boldly submitted that by reason of that instrument, the plaintiffs had no interest in the property and that the bank were not 'mere mortgagee'. He relied on art 3.1 (a) and (b) of the deed which is as follows:

> (a) SG may without prejudice to its rights as mortgagees in possession elect at its sole option and discretion to exercise any or all of the following rights:
>
> (i) apply in the name of KCI to bring the mortgaged property within the provisions of the Land Titles Act (Cap 157, 1985 Ed) and to apply for the subdivision of the same. All costs and expenses incurred in this regard shall be borne by KCI;

(ii) sell either as mortgagees under its powers of sale or as attorney for KCI by private treaty or otherwise the whole or any part or parts of the mortgaged property to whomsoever and subject to such terms and conditions as SG may deem fit;

(iii) become in its own name, by its nominee's name or by any other name as SG may direct, the legal and beneficial owner of the whole or any part or parts of the mortgaged property by way of sale under art 3.1 (a)(ii) at such price as may be determined by an independent valuer from the firm of Collier Goh & Tan, Jones Lang Wootton or Knight Frank Cheong Hock Chye & Baillieu (Property Consultants) Pte Ltd or by way of foreclosure proceedings free of KCI's equity of redemption (both legal or equitable) and any or all other encumbrances of whatever nature;

(iv) bring any proceedings in court to enforce their rights in this deed and/or foreclose on the whole or any part of the mortgaged property and KCI and/or KCTC shall irrevocably and unconditionally consent to all or any of the orders sought by SG in such proceedings.

(b) For the avoidance of doubt it is hereby agreed and declared that SG shall be at liberty to exercise any or all of the aforesaid rights or in any order or manner as it may in its sole and absolute discretion deem fit.

Counsel for the plaintiffs submitted that notwithstanding art 3.1 of the deed of compromise, the bank as mortgagee was still required to act in good faith and with reasonable care in selling the property: that clause did not give the bank authority or carte blanche to act as they think fit in disregard of those duties under the general law. He relied on *Bishop* v *Bonham*.[5] In that case, one of the provisions contained in the instrument creating a mortgage or charge on the shares of the plaintiff provided:

> If the depositor shall fail to pay on demand any moneys hereby secured or shall default in respect of any of the depositor's obligations to you or shall become bankrupt or insolvent or shall make or attempt to make any composition or arrangement with the depositor's creditors or a resolution shall be passed or order made or petition presented for the winding up of the depositor, then and at any time thereafter you may without notice to the depositor sell the securities or any of them in such manner and upon such terms and for such consideration (whether payable or deliverable immediately or by instalments) as you may think fit. You shall have no liability for any loss howsoever arising in connection with any such sale ...

It was contended that that clause absolved the mortgagee from any breach of duty owed towards the depositor or mortgagor in the absence of any specific charge of bad faith. The Court of Appeal rejected this argument. Slade LJ said, at pp 753-754:

> In my judgment where the general law imposes a duty on a person to act with reasonable care in carrying out a particular transaction, the natural construction of words authorizing a person to carry out such a transaction in such manner and upon such terms and for such consideration 'as you may think fit' is as authorizing that person to carry out the transaction in such manner (and so on) as he thinks fit, within the limits of the duty of reasonable care imposed by the general law — no more, and no less. The words do not in my judgment give the recipient authority, or carte blanche, to act as he thinks fit in disregard of that duty, and cannot properly be so read, even if the second sentence of cl 3 is read in conjunction with them as Mr Davis submits it should.
>
> Similarly, in my judgment, an authority given to a mortgagee to sell the mortgaged property in such manner, upon such terms and for such consideration as he may think fit, must be read as subject to the implicit limitation that it is to be exercised properly, within the limits of the general law, that is to say, with the exercise of reasonable care to obtain a proper price.

On the second sentence of cl 3, the learned judge said, at p 756:

> In the context of cl 3 of the charge agreement in the present case, the crucial point is, in my judgment, that the exemption is thereby expressed to be conferred in respect of 'any loss howsoever arising in connection with any such sale'. 'Any such sale' must, in my view, mean a sale authorized by the preceding words of the clause. The preceding words, as I have indicated (contrary to Mr Davis's submission), in my judgment definitely do not authorize a sale to be effected by the chargee in breach of the duties imposed on him by the general law as explained in the *Cuckmere* decision [1971] Ch 949.

I do not propose at this stage to put a final construction on this clause; the same point of construction will, I am sure, be argued at the trial, and it is more appropriate for the trial judge to adjudicate on this issue definitively. For the present purpose, my view on the construction of this clause is a prima facie one. I do not think that these provisions constitute the bank an absolute owner of the property or deprive the plaintiffs of any interest in the property. These provisions may have the effect of enlarging the rights of the bank as mortgagee and, in my view, the bank notwithstanding the execution of the deed of compromise continue to be a mortgagee of the property. As mortgagee, they entered into the sale agreement with Amcol. Nor do I think that these provisions enable the bank to dispose of the property without any regard to the rights of the plaintiffs as mortgagor. In my view, they do not exonerate the bank from their obligations to act in good faith and to take reasonable care to obtain the proper price or the 'true market value' thereof.

Counsel for the bank relied further on art 6.2 which provides:

> KCI irrevocably and unconditionally waives all or any rights and/or remedies that it may now or hereafter have as mortgagors in respect of the mortgaged property against SG.

Here again, I express a prima facie view on the construction of this clause. In my opinion, the clause must be construed in the state of things as they were at the time of execution of the deed of compromise. It cannot apply to circumstances of which the parties had no knowledge at the time or which had not then occurred: see *Low Fong Mei & Anor* v *Ko Teck Siang & Ors*.[6] Construed in this way, it

could not have been intended that the plaintiffs agreed at the time of execution of the deed to waive any rights and remedies against the bank for any breach of duty as mortgagee which would or might be committed at a subsequent date. Surely it was not in the contemplation of the parties then that in exercising the power of sale as mortgagee subsequently, the bank would or might act in breach of their duties of good faith and taking reasonable care.

It was also contended by counsel for the bank that the bank had derived no benefit from: (i) the agreement to take a lease of the four floors of the property, and (ii) the option to purchase the six floors of the property. In respect of the agreement for a lease, counsel relied on the fact that the plaintiffs had agreed to grant to the bank a lease of the same premises for a term of two years at a rent of $3 per sq ft. As for the further term of three years at a rent of $5 per sq ft, that rent was based on the estimate given by an independent valuer. With regard to the option to purchase the six floors of the property, counsel pointed out that under the deed of compromise, the bank has the power to acquire all or any part of the property. In my opinion, such an argument is unsustainable. In so far as the agreement for a lease is concerned, the bank has obtained a security of tenure for the next five years. That clearly is a benefit. True it is that the plaintiffs agreed to grant a tenancy to the bank for a term of two years at a rent of $3 per sq ft inclusive of service charge. But, it seems to me that, looking at the matter from a practical point of view, if the bank were not the mortgagee of the property, it could well be that the plaintiffs in the light of present market conditions would not agree to grant to the bank a tenancy of two years at that rent. In my view, that rent is not necessarily the market rent for the time being. As for the option to purchase the six floors of the property, there is no question that that is a benefit: the bank has a right over a period of six months to repurchase, if they deem fit, all or any one or more of the six floors at a certain price. True it is that under the deed of compromise, the bank is entitled to acquire all or any part of the property. However, on the authority of *Tse Kwong Lam*,[2] such an acquisition must satisfy the tests of good faith and reasonable care.

I now turn to the case of Amcol. They maintained that no injunction ought to be made against them unless it could be shown that they had knowledge of any impropriety on the part of the bank in relation to the sale. The bank in this case had taken reasonable precautions in obtaining the true market value; they obtained a valuation of the property for $131m and sold the property at that price. Amcol also obtained a valuation which indicated a figure of $131.8m and agreed to purchase the property at $131m. There was no question of any collusion or conspiracy with the bank to deprive the plaintiffs of their rights to the property. The sale agreement was negotiated and made in good faith. It is not necessary for me at this stage to consider and decide whether Amcol had any knowledge of any impropriety on the part of the bank. Nor, a fortiori, is it necessary to decide the more serious controversial issues of collusion and conspiracy as alleged by the plaintiffs. These are issues for trial. Nonetheless, on the question of knowledge of Amcol, the following are significant and are relevant even at this interlocutory stage. Amcol must have been aware of the fact that there were disputes between the bank and the plaintiffs and also of the fact that these disputes had been amicably settled. They were fully aware that the bank were selling the property as mortgagee and that there had been no advertisement of the property for sale. They admitted that they were not aware of the contents of the deed of compromise which conferred on the bank certain rights. For some reasons, which I know not, Amcol were approached by the bank with an offer of the property at a certain price and on terms, inter alia, that upon purchase of the property Amcol would grant to the bank a lease of the four floors for five years at certain rents and an option to repurchase the uppermost six floors at a certain price. Such terms are obviously beneficial to the bank, and Amcol must have appreciated them to be so. Without more ado, apart from taking an independent valuation of the property which, it seems to me, was purely for their own purpose and had no connection with any propriety or impropriety on the part of the bank in relation to the sale, they proceeded to negotiate with the bank and concluded the sale agreement. In these circumstances, it is very arguable that Amcol were seized of facts sufficient to place them on notice that the sale of the property by the bank was in breach of duties as mortgagee. Further, even if Amcol had no knowledge of any impropriety of the bank in relation to the sale, an injunction could still properly be granted against them: *Forsyth* v *Blundell*.[3]

The plaintiffs have certainly established that there are serious questions to be tried. Indeed, it seems to me prima facie that what the bank did went beyond mere failure to take reasonable steps to obtain the best price for the property in the circumstances. In the words of Fox J, their conduct at about the time of the sale reflected a calculated indifference to the position of the mortgagor and could be said to be 'reckless' and to 'sacrifice' the interest of the plaintiffs.

It was urged on me by both counsel for the bank and counsel for Amcol that in this case damages were an adequate remedy and no injunction ought to be granted: *American Cyanamid Co* v *Ethicon Ltd*.[7] In that case, Lord Diplock said, at p 408:

> ... the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoyed between the

time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, *no interlocutory injunction should normally be granted*, however strong the plaintiff's claim appeared to be at that stage. (Emphasis added.)

This principle is well-known; I did consider it, and I granted the interlocutory injunction; I have two reasons for so doing. First, I am not satisfied that in this case damages would be an adequate remedy to the plaintiffs, should they succeed at the trial. Damages would not be an adequate remedy to a party who is being or will be deprived of his enjoyment of land: *Good Property Land Development Pte Ltd* v *Societe Generale*[8] at p 22. The plaintiffs in this case are the owners of the property, though they had executed the deed of compromise and had given possession thereof to the bank as mortgagee. It appears that prior to delivery of possession of the property to the bank, the plaintiffs were in occupation of various parts of the property; they were having personal enjoyment of substantial parts of the property. There was evidence before me that in May and June 1989 they were seeking fresh finance to redeem the property, though they were unsuccessful up to the time of sale. Unlike the case of a hotel in *Good Property Land Development Ltd* v *Societe Generale*[8] which was held by Chan Sek Keong J to be an investment, the property is more than an investment to the plaintiffs.

Secondly, the principle governing the grant or refusal of interlocutory injunction as laid down in *American Cyanamid*,[7] which I have quoted, is not an inflexible rule. By its very terms, it admits of exceptions. In *Parry* v *Grace*[9] at p 275, Thorp J expressed his reservation whether such rule applied to the issue of injunction restraining the exercise of the mortgagee's power of sale. He said, at p 275:

I indicated that on the papers before me I was satisfied that there was a serious question for consideration arising out of the plaintiffs' claim, but that I was not convinced that injunctions to restrain exercise of a mortgagee's powers fell to be dealt with on the ordinary rules governing the issue of interim injunctions as established by *American Cyanamid* v *Ethicon Ltd* [1975] AC 396.

In this case, the plaintiffs are seeking to restrain the bank and Amcol from completing the sale on the ground, inter alia, that the bank in exercising the power of sale as mortgagee did not act bona fide. On the material before me there is cogent prima facie case. If the plaintiffs make good their case at the trial, they would be entitled to a perpetual injunction against both the defendants: *Forsyth* v *Blundell*.[3] In my judgment, in these circumstances, it is not an answer to an application for an interlocutory injunction to say that damages would be an adequate remedy.

Both counsel also contended that if the interlocutory injunction was to be granted, the plaintiffs should be required to bring to court the whole of the amount due and owing to the bank, and in support they relied on the ordinary rule that where a mortgagor seeks an interlocutory injunction to restrain the mortgagee from exercising the power of sale of the mortgaged property, the mortgagor is required to pay into court the amount of the mortgage debt, if it is not in dispute, and, if the amount is in dispute, the amount claimed by the mortgagee. There is undoubtedly an abundance of authorities in support of this rule. If this requirement is imposed in this case, it is impossible of fulfilment and would cause manifest hardship; the object of doing justice between the parties could never be achieved.

In the case of *Harvey* v *McWatters*,[10] Sugerman J made a distinction between the case in which the power of sale is exercisable and the only dispute is as to the amount due or the mode in which the mortgagee proposes to exercise the power of sale and the case in which the very matter in dispute is whether the power of sale is exercisable at all. He held that in the first case, the ordinary rule would apply and the whole amount alleged to be due and owing to the mortgagee would be required to be paid into court, and in the second case the amount which would be ordered to be paid into court would not necessarily be the whole amount claimed but only such amount as would be sufficient to give adequate protection to the mortgagee. He said, at p 178:

There is a distinction between what I have called the ordinary case and the case in which the existence of the power of sale or the question whether it is exercisable at all is in question. The present case is of the second class. What is called the ordinary rule applies to cases of the first class, and to those cases only. This flows from the principles and reasoning on which that rule depends. Cases of the second class are, as regards interlocutory applications, governed by a rule of a similar type. But it is a rule resting on different principles and reasoning. These permit of a greater flexibility. They do not require that in every case the whole amount claimed or sworn to by the mortgagee or seen from the terms of the instrument to be the greatest amount that could be due should be paid in. The terms may be moulded so as to require payment in of so much only as suffices to give adequate protection to the mortgagee.

In my opinion, the present case does not fall squarely within the first class of cases specified by Sugerman J. This is a dispute on the propriety of the exercise of the power of sale and not on the amount due or the mode in which the bank proposes to exercise the power of sale. Further, the classification made by Sugerman J is by no means intended to be exhaustive; there may well be other cases of dispute between the mortgagor and mortgagee which fall into neither of the classes and which should be treated on the same basis as the second class of cases stated by Sugerman J. For instance, the situation in *Macleod* v *Jones*[11] is another instance where the ordinary rule was not applied. There, the mortgagee at the time of taking the mortgage was the solicitor of the mortgagor. Later, the

mortgagor discharged the mortgagee as her solicitor and engaged another solicitor who applied to the mortgagee for information on the securities. The mortgagee refused to give the information unless payment of what was due was guaranteed and threatened to proceed with the sale. The mortgagor brought an action to impeach the securities and restrain the sale of the property, and moved for an interlocutory injunction. The court of first instance refused the injunction but on appeal, the Court of Appeal allowed it, and directed the mortgagor to pay into court not the sum claimed by the mortgagee but only an amount which having regard to the securities would protect the mortgagee and make him save.

There is another reason why in my opinion the ordinary rule is not applicable here. The plaintiffs are challenging the propriety of the sale of the property by the bank to Amcol. Both the defendants are asserting the validity of the sale. The point in issue is not the amount due under the mortgages; nor is it one as to the mode in which the bank proposes to exercise their power. If the defendants succeed, they would be entitled to proceed and would proceed to complete the sale, and in such an event the payment into court of the whole amount due to the bank does not facilitate or assist such completion; it has no relevant connection with the completion of the transaction.

What is relevant, however, is that both the defendants should be protected against any loss or damage which they or either of them may suffer as a result of the interlocutory injunction, should it turn out that the plaintiffs fail at the trial to make good their claim for a perpetual injunction. The protection I had in mind was a fortification of the cross-undertaking as to damages given by the plaintiffs. Unfortunately, on this point I received no meaningful proposal from any party as to the amount the plaintiffs should provide to secure their cross-undertaking. I therefore had to decide what, in my view, would be a fair and reasonable amount. I took the figure of $8m which I considered as fair and reasonable in the circumstances; it represents slightly more than 6% of the sum of $131m. I therefore imposed the term requiring the plaintiffs to deposit in court a sum of $8m or furnish a banker's guarantee for that amount to secure the cross-undertaking as to damages.

Application allowed.

Solicitors: *Wee Ramayah & Partners; Cooma Lau & Loh; Allen & Gledhill.*

Reported by *Terence Tan Bian Chye*

Ong & Co Pte Ltd v Foo Sae Heng

HIGH COURT (SINGAPORE) — SUIT NO 4462 OF 1986
CHAO HICK TIN JC
15 JANUARY 1990

Securities — Memorandum of deposit — Margin account — Construction of memorandum — Bare claim that mortgagee had negligently sold security — Purchase of shares — Whether purchase without instructions

The plaintiffs were stockbrokers. The defendant executed a memorandum of deposit in favour of the plaintiffs in order to obtain facilities from the plaintiffs to deal in stocks and shares on the Singapore Stock Exchange. Pursuant thereto, some securities were deposited with the plaintiffs. The memorandum provided that 'if (the defendant) makes default in paying, (the plaintiffs) may dispose of any securities'. At the request of the defendant, the plaintiffs bought and sold stocks and shares on the defendant's behalf pursuant to a margin account arrangement. Later, the defendant owed an outstanding amount of $168,255.02. The assistant registrar gave summary judgment against the defendant. The defendant claimed that there was negligence on the plaintiffs' part in failing to obtain the best possible price in liquidating the securities. Also, it was claimed that the defendant had never given instructions to purchase the shares.

Held, dismissing the defendant's appeal:

(1) As regards the point that the plaintiffs had been negligent in liquidating the securitites, that was a bare allegation. No evidence was tendered that the securities were not sold at the then market price on the Singapore Stock Exchange.

(2) As regards the point that the defendant had never given instructions to purchase the shares, this point was totally devoid of merit. Debit notes were sent to the defendant. The defendant had not denied that he received the debit notes. If in fact the purchases were contrary to instructions, one would expect an immediate protest by him.

(3) By not objecting to the documents sent to him, he had effectively affirmed that the transactions were properly carried out. He was estopped from denying the same.

(4) The defendant's last point was that the statement of claim was defective because it failed to state what moneys were received from the sale of the securities and how they were utilized to offset outstanding debts due from the defendants to the plaintiffs. These were really matters of details and evidence. The documents furnished by the plaintiffs to the defendant in the ordinary course of business would have clearly shown to the defendant the details he was asking. The court was satisfied that the defendant had no defence and was desperately fishing for one. He was only seeking to delay judgment.

[*Editorial Note*: The defendant has appealed to the Court of Appeal vide Civil Appeal No 131 of 1989.]

Tan Hin Tat for the plaintiffs.
S Asogan for the defendant.

Cur Adr Vult

Chao Hick Tin JC: The plaintiffs were stockbrokers. At the request of the defendant, the plaintiffs bought and sold stocks and shares on the defendant's behalf pursuant to a margin account arrangement. As on 30 June 1986, the